

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0576

IN THE SUCCESSION OF LOUIS ANDREW THOMAS, II

Consolidated With

2010 CA 0577

RICHARD S. THOMAS

VERSUS

LOUIS ANDREW THOMAS, III

Judgment Rendered: DEC 29 2010

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On Appeal from the Twenty-Second Judicial District Court
In and For the Parish of St. Tammany
State of Louisiana
Docket No. 2007-30066 c/w 2009-10348

Honorable Richard A. Swartz, Judge Presiding

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McDonald, J. concurs.

McCLENDON, J.

In this consolidated succession matter, an adult child and legatee of the decedent appeals from a judgment granting an exception of prescription and dismissing his claims against another adult child and legatee. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

The decedent, Louis A. Thomas, II, executed a last will and testament on December 15, 2003, bequeathing his residence and automobile to his son, Louis A. Thomas, III (Louis). The decedent divided the remainder of his estate between Louis and another son, Richard S. Thomas (Richard), giving Louis seventy percent and Richard thirty percent. Decedent purposely made no provisions for his other adult children, James Thomas, Marilyn Thomas, and Patricia Sweeney. Louis was named executor in the will. Decedent died on February 1, 2006.

On January 22, 2009, Richard filed suit against Louis seeking the return of the value of three annuities to decedent's estate.¹ On April 17, 2009, Richard filed an amended petition specifically alleging that fraud had been committed by Louis regarding the sale of the annuities to the decedent. On the same date, Louis filed his answer and an exception of prescription. On May 18, 2009, pursuant to a joint motion to consolidate, the court consolidated this matter with the previously filed succession proceeding of the decedent.²

Following a hearing on the exception of prescription held on October 21, 2009, the trial court issued reasons for judgment on October 22, 2009. The trial court determined that Richard had sufficient notice regarding the three annuities at issue when "[a]ll information and documents regarding the annuities were provided to plaintiff in response to discovery requests issued in the succession

¹ This is the matter entitled **Richard S. Thomas v. Louis A. Thomas, III**, bearing suit number 2009-10348, of the 22nd Judicial District Court for the Parish of St. Tammany.

² This is the matter entitled **Succession of Louis A. Thomas, II**, bearing suit number 2007-30066, of the 22nd Judicial District Court for the Parish of St. Tammany. See **Succession of Louis A. Thomas, II c/w Richard S. Thomas v. Louis Andrew Thomas, III**, 2010 CA 1001 c/w 2010 CA 1002, also decided this date.

proceedings by plaintiff to defendant, as administrator of the estate." Because the discovery responses were mailed to Richard on March 20, 2007, and because suit was not filed until January 22, 2009, "[Richard's] cause of action against [Louis], including claims of fraud, prescribed one year from the date the documents were provided to [Richard], or on March 28, 2008." Accordingly, the trial court granted Louis's exception of prescription. Judgment maintaining the exception and dismissing Richard's petition was signed on November 30, 2009. Richard appealed.

DISCUSSION

Pursuant to LSA-R.S. 22:47(17), an annuity is classified as a form of insurance.³ It is described as a "contract sold by insurance companies that pays an income benefit for the life of a person, for the lives of two or more persons, or for a specified period of time, or a contract that may provide for a series of payments to be made or received at regular intervals at the direction of the contract holder." LSA-R.S. 22:47(17).⁴ However, annuity contracts are generally recognized as investments, rather than as insurance. **Succession of Halligan**, 03-1168, p. 6 (La.App. 1 Cir. 9/17/04), 887 So.2d 109, 113, writ denied, 04-2619 (La. 12/17/04), 888 So.2d 875.

³ Louisiana Revised Statute 22:47 was renumbered from R.S. 22:6 by Acts 2008, No. 415, § 1, eff. Jan. 1, 2009.

⁴ An annuity contract is also defined in LSA-R.S. 22:912B(2) as follows:

The term "annuity contract" shall include any contract which:

(a) Is issued by a life insurance company licensed to provide the contract in the state in which it was issued at the time of issue.

(b) States on its face or anywhere within the terms of the contract that it is an "annuity" including but not limited to an immediate, deferred, fixed, equity indexed, or variable annuity, irrespective of current pay status or any other definition of "annuity" in Louisiana law.

(c) Provides the contract owner the ability to defer United States income taxes on any interest earned and not distributed to the owner.

(d) Transfers some risk of financial loss to the insurance company for financial consideration.

(e) Was approved as an annuity contract by the Department of Insurance of the state in which it was issued prior to issue.

Louisiana Revised Statute 22:912 was renumbered from R.S. 22:647 by Acts 2008, No. 415, § 1, eff. Jan. 1, 2009.

In this matter, decedent, while living in Florida, purchased a \$75,000 annuity from Jackson National Life Insurance Company (Jackson National), on November 15, 2002, naming Richard S. Thomas, Patricia Sweeney and Louis A. Thomas, III as beneficiaries. On July 14, 2004, the decedent changed the beneficiaries to Louis and Louis's wife. On March 10, 2004, decedent purchased a \$75,000 annuity from Allianz Life Insurance Company of North America (Allianz) naming Louis as beneficiary. Lastly, on January 28, 2006, the decedent purchased a \$6,000 annuity from Allianz naming his six great-grandchildren as the beneficiaries.⁵ Of the three annuities at issue, Louis sold the last two to the decedent, as a licensed insurance agent.

Richard maintains that Louis has undertaken a continuing scheme of taking money from the decedent and concealing his actions for his own benefit to Richard's detriment. He contends that Louis deliberately kept information from him and he did not know that he had a claim until Louis's deposition was taken on January 23, 2009. Richard also argues that Louis's violation of the insurance code in selling the annuities to his father amounted to fraud *per se*. Thus, he asserts, because the time limitations provided for in LSA-R.S. 9:5606A do not apply in cases of fraud, the trial court erred in granting the exception of prescription.

Louisiana Revised Statute R.S. 9:5606A provides:

No action for damages against any insurance agent, broker, solicitor, or other similar licensee under this state, whether based upon tort, or breach of contract, or otherwise, arising out of an engagement to provide insurance services shall be brought unless filed in a court of competent jurisdiction and proper venue within one year from the date of the alleged act, omission, or neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered. However, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission, or neglect.

⁵ We note that of the beneficiaries, only four were Louis's grandchildren.

The one-year and three-year periods of limitation provided in LSA-R.S. 9:5606A are preemptive. LSA-R.S. 9:5606D⁶; **Klein v. American Life & Cas. Co.**, 01-2336, p. 4 (La.App. 1 Cir. 6/27/03), 858 So.2d 527, 530, writs denied, 03-2073 (La. 11/7/03), 857 So.2d 497 & 03-2101 (La. 11/7/03), 857 So.2d 499. However, the preemptive period provided for in Subsection A does not apply in cases of fraud. LSA-R.S. 9:5606C.⁷

In this matter, given that Richard has made allegations of fraud, which, if proven, would preclude the application of the preemptive period found in LSA-R.S. 9:5606A, we choose to initially address the one-year period from the date of discovery within which Richard had to file suit. Further, even if we were to find that the preemptive periods do not apply, Richard's claims of fraud are nevertheless subject to the liberative prescriptive period of one year applicable to delictual actions and contained in LSA-C.C. art. 3492. See **Shermohmad v. Ebrahimi**, 06-512, p. 5 (La.App. 5 Cir. 10/31/06), 945 So.2d 119, 122. Prescription commences to run from the day injury or damage is sustained. Damage is sustained when the damage has manifested itself with sufficient certainty to support accrual of a cause of action. **Cole v. Celotex Corp.**, 620 So.2d 1154, 1156 (La. 1993); **Shermohmad**, 06-512 at p. 5, 945 So.2d at 122.

Richard asserts that under the facts of this case, his mere apprehension that something was wrong was insufficient to commence the running of time limitations. He argues that Louis, as agent and executor of the estate, purposely kept him in the dark with regard to decedent's financial information and then attempted to hide the truth with regard to his self-dealing. Richard alleges that it was not until he was able to take the deposition of Louis on January 23, 2009, by court order, that he "began to have knowledge of some of [Louis's] actions."

⁶ In 1999, the legislature amended LSA-R.S. 9:5606, adding subsection D, which expressly makes both the one-year and three-year periods of limitation preemptive. Acts 1999, No. 905, § 1.

⁷ Subsection C of LSA-R.S. 9:5606 provides:

The preemptive period provided in Subsection A of this Section shall not apply in cases of fraud, as defined in Civil Code Article 1953.

He contends that it was only then that he knew that Louis, as an insurance agent, moved money out of the decedent's accounts through the annuities.

When evidence is introduced at the hearing on a peremptory exception of prescription, the trial court's findings of fact are reviewed under the manifest error-clearly wrong standard of review. **Babineaux v. State ex rel. Dept. of Transp. and Dev.**, 04-2649, p. 3 (La.App. 1 Cir. 12/22/05), 927 So.2d 1121, 1123. The record shows that at the hearing on the exception, Richard offered into evidence the entire suit record, including the exhibits in the consolidated succession proceeding. The exhibits included the annuity documents produced by Louis on March 20, 2007, in response to a subpoena issued by Richard on February 27, 2007.⁸ With regard to at least the last two Allianz annuities, the documents clearly show the named beneficiaries and that Louis was the agent for his father. Based on the record, the trial court concluded that Richard had sufficient knowledge after March 20, 2007, to excite his attention and put him on notice that an inquiry was necessary. We agree and find no manifest error in this factual finding of the trial court.⁹

Because Richard was aware or should have been aware of the alleged damage on March 20, 2007, and because Richard did not file his petition until January 22, 2009, more than one year after the date of discovery, his suit was therefore untimely. Accordingly, the trial court correctly maintained Louis's peremptory exception raising the objection of prescription.

CONCLUSION

For the foregoing reasons, we affirm the November 30, 2009 judgment of the trial court. All costs of this appeal are assessed to Richard S. Thomas.

AFFIRMED.

⁸ The subpoena return was certified that it was forwarded to Richard on March 20, 2007.

⁹ With regard to the March 20, 2007 subpoena return, we also note that Richard did not file a motion to compel compliance with the subpoena until May 29, 2009.